86 1881

Supreme Court, U.S.
FILED
MAY 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

SPRING TERM, 1987

NO. _____

TRACY S. BARCELONA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BERG & ANDROPHY
DAVID H. BERG
JOEL M. ANDROPHY
3702 Travis Street
Houston, Texas 77002
(713) 529-5622

Attorneys for Petitioner

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

I.

QUESTION PRESENTED

Whether the prosecutor's negligence was the kind of overreaching or harassment that should cause this Court to reconsider its opinion in *Oregon v. Kennedy*, 456 U.S. 667 (1982), and adopt a more flexible standard as proposed by the four concurring justices.

II.

PARTIES TO THE PROCEEDING BELOW

Appellant Below:

TRACY S. BARCELONA (Petitioner herein)

Appellee Below:

UNITED STATES OF AMERICA (Respondent herein)

III.

TABLE OF CONTENTS

		Page
I.	QUESTION PRESENTED	I
II.	PARTIES TO THE PROCEEDING BELOW	II
III.	TABLE OF CONTENTS	III
IV.	TABLE OF AUTHORITIES	IV
	A. CASES	IV
	B. STATUTES	IV
	C. CONSTITUTION	IV
V.	DECISIONS BELOW	V
VI.	JURISDICTIONAL STATEMENT	VI
VII.	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	VII
VIII.	STATEMENT OF THE CASE	1
IX.	ARGUMENT AND REASONS FOR GRANTING OF WRIT	4
X.	CONCLUSION AND PRAYER	9
XI.	CERTIFICATE OF SERVICE	10
XII.	APPENDIX	1a

IV.

TABLE OF AUTHORITIES

A. CASES

	Page
Oregon v. Kennedy, 456 U.S. 667 (1982)	4, 5, 6, 7, 9
United States v. Dante, 739 F.2d 547 (11th Cir.), *cert. denied*, 105 S. Ct. 512 (1984)	5, 6
United States v. Dinitz, 424 U.S. 600 (1976)	4, 9
United States v. Mitchell, 736 F.2d 1299 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 94 (1985)	5, 6
United States v. Garza, 603 F.2d 578 (5th Cir. 1979)	7, 9
United States v. Zielie, 734 F.2d 1447 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 957 (1985)	5, 6

B. STATUTES

United States Code:

18 U.S.C. § 657	1
18 U.S.C. § 1344	1

C. UNITED STATES CONSTITUTION

Fourteenth Amendment	4

V.

DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *United States v. Barcelona,* ____F.2d____, (5th Cir. 1987) and is attached as Appendix "A."

The orders of the United States District Court for the Southern District of Texas are attached as Appendix "B."

The judgment of the United States Court of Appeals for the Fifth Circuit is attached as Appendix "C."

VI.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on March 27, 1987. There have been no extensions of time within which to petition for a writ of certiorari, and this is not a cross-petition for a writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to review the judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari.

VII.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. These are set out in their entirety in Appendix "H."

VIII.

STATEMENT OF THE CASE

Petitioner was charged with embezzlement, willful misapplication of bank funds and executing a scheme and artifice to defraud a federally insured financial institution in violation of 18 U.S.C. §§ 657 and 1344.

On September 5, 1984, Barcelona used a $22,000 check to purchase two certificates of deposit at Guaranty Federal Savings & Loan ("Guaranty Federal") for Pamela Mendiola ("Mendiola"). Allegedly without authorization, Barcelona withdrew $2,000 for his personal use. Mendiola, in turn, received only two $10,000 certificates of deposit. On October 26, 1984, Barcelona, with authorization, transferred money from Mendiola's savings account at one branch to a new account at a different branch. Allegedly without authorization, Barcelona took $7,000 from the new account deposit for his own use.

Guaranty Federal recorded that transaction on a multipart form. The bank retained a carbon copy of the form (the "bank copy"), and the customer received the original. The government alleges that after making the deposit Barcelona altered only the original in two ways: by changing the "Less Cash" line from $7000 to $9000 and by adding the phrase "91 Day CD" to that line to indicate that he had used the $9000 to purchase another certificate of deposit (App. "D"). Barcelona then gave the altered customer original to Mendiola. The government argues that Barcelona altered the customer original to hide the $2000 that he took on September 5, 1984, and the $7000 that he took from the new account deposit. In any case, the altered customer original (App. "D")

of the new account deposit reflects those changes, which are not found on the bank copy. (App. "E").

Barcelona's counsel planned a two-fold defense: (1) that Barcelona was legally insane at the time of the offense; and (2) that he lacked the specific intent to commit the alleged crimes. He planned to argue that because Barcelona had done everything in the open, he wanted to be caught. Barcelona's counsel intended to argue from that premise that Barcelona never intended to deceive anyone and must have been insane.

During discovery, the government turned over a photocopy of the altered customer original of the new account deposit (App. "F"). The photocopy did not reflect that the alterations were made with a different pen. In other words, the photocopy did not reveal that Barcelona deceptively altered the customer original, which he gave Mendiola. Moreover, the government never gave Barcelona's counsel even a photocopy of the bank copy of the new account deposit. (App. "E"). Comparison of the bank copy with a copy of the customer original also would have demonstrated the alteration and hence Barcelona's deception. Had the government provided either the customer original itself (as opposed to a photocopy) or even a photocopy of the bank copy, then Barcelona's counsel would have realized that his planned defense did not fit the facts.

At trial, defense counsel based its opening argument upon the defense that Barcelona's scheme was so transparent that Barcelona had to have been insane at the time. According to defense counsel, Barcelona never tried to hide the alleged thefts and that supported the argument that he was insane. During its case, the government intro-

duced the customer original and also the bank copy of the new account deposit. Obviously altered, the customer original discredited any defense based on a lack of deception. In addition, the discrepancies between the bank copy and the altered customer original also demonstrated that Barcelona had altered the customer original after it was detached from the bank copy. Surprised by the introduction of the evidence that he had never seen, counsel moved for a mistrial, which the court granted. Following the Motion for Mistrial the Government opened their file to the defense. Further disclosures were made evidencing the government's pattern of deceptive conduct. (App. "G," excerpts of Petitioner's brief in the U.S. Court of Appeals for the Fifth Circuit, pp. 14-16).

The government admits that it had a continuing duty of disclosure and should have called the alterations to defense counsel's attention before the trial began. The Assistant United States Attorney stated that the omission had been inadvertent and that he had either been unaware of or not appreciated the significance of the variance between the customer original and the bank copy. The trial court accepted that explanation but granted a mistrial because the surprise had already prejudiced Barcelona's defense at the first trial.

Three days later, Barcelona filed motions to bar any retrial on the grounds of double jeopardy and prosecutorial misconduct. After a hearing the trial court denied both motions to dismiss.

IX.

ARGUMENT AND REASONS FOR GRANTING OF WRIT

Prior to *Oregon v. Kennedy*, 456 U.S. 667 (1982), the standard for dismissal or double jeopardy grounds was based on the rule set forth in *United States v. Dinitz*, 424 U.S. 600 (1976):

> The Double Jeopardy Clause [of the Fifth Amendment] does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant.

Id. at 611 (citation omitted).

This Court in *Oregon v. Kennedy*, 456 U.S. 667, 675-676 (1982), narrowed the standard and held that a defendant is entitled to dismissal on double jeopardy grounds only if the court finds the prosecutor intentionally provoked the defendant into moving for a mistrial so the Government would have the opportunity to try the case before another jury. *Id.* at 675-676.

This Court in *Oregon v. Kennedy* did not modify the standard to open the door to prosecutorial misconduct. The standard was merely modified to clarify confusion and misapplication. *Id.* at 680-681. Although the results have been consistent, the analyses of the lower courts are fraught with confusion and misapplication.

For example, in *United States v. Dante,* 739 F.2d at 548, the Eleventh Circuit was faced with improper remarks by the prosecutor during opening statement. The court, after reviewing the statements made and applying the standard of *Oregon v. Kennedy,* 456 U.S. 667, concluded that the requisite intent to provoke a mistrial was absent:

> The court pointed to the fact that the references to organized crime referred to the Government's witnesses only and there was no direct reference to either of the defendants in that regard. The court further noted that the delay will work to the defendants' advantage rather than disadvantage and the failure of the defendants to object to the violations of the court's order at the time they were made when the infraction could have been *cured* with proper instructions to the jury, 'mitigated to a certain extent the Government's violation.'

Id. at 549. (emphasis added).

In *United States v. Zielie,* 734 F.2d 1447, 1459 (11th Cir. 1984), the Eleventh Circuit concluded that improper statements by a prosecution witness were not sufficient evidence that the prosecution intended to cause a mistrial. The Court based its conclusion on the fact that the "government gained no advantage by the mistrial since the evidence adduced at the second trial was the same as that used in the first trial." *Id.*

Similarly, in *United States v. Mitchell,* 736 F.2d 1299 (9th Cir. 1984), the defense unsuccessfully raised the Double Jeopardy claim based upon the prosecution's withholding of information concerning a conflict of interest until late during a trial. It was defendant's theory that

the prosecution held back certain government witnesses knowing that to call them to testify would provoke a mistrial. The court, applying *Oregon v. Kennedy,* 456 U.S. 667, concluded by stating:

> [A] second trial of defendants on the charges of which they are accused most justly strikes the balance between the concerns of the accused in having his case heard in its entirety before a single jury and that of society convicting the guilty. The needs of society must not be permitted to suffer because of the ever increasing complexity of conducting a trial involving multiple defendants entangled in a labyrinth of interrelationships that typifies the modern day narcotics conspiracy. *Given the absence of anything beyond sheer speculation supporting defendant's theory of intentional Government conduct designed to illicit defendant's consent to a mistrial,* and the substantial evidence supporting the trial court's conclusion that the *withholding of the witnesses' names was justified,* this court finds that the present case does not fall within the narrow exception to the consent category of mistrial cases.

Id. at 1304. (emphasis added).

The government's pattern of deceptive conduct in Barcelona amounted to more than a simple prejudicial remark as discussed in *Oregon v. Kennedy* and *Dante.* Unlike *Dante,* there was no way to "cure" the effect of the government's conduct in BARCELONA. Unlike *Zielie,* the government will have more evidence to offer at a second trial, especially with regard to rebuttal testimony. And, unlike *Mitchell,* the withholding of the BARCELONA evidence cannot be "justified," nor can it be concluded that it would be "only sheer speculation" that the government intended to provoke a mistrial.

The results of this inflexible standard as expressed by Justices Stevens, Brennan, Marshall and Blackman, will preempt those exceptional cases justifying application of the double jeopardy clause. 456 U.S. at 691-692 (concurring opinion).

In addition, Justice Powell even recognized that *Oregon v. Kennedy,* would have been a "close case" if there was a sequence of overreaching prior to the single prejudicial question. 456 U.S. at 682. (concurring opinion).

The law in the Fifth Circuit prior to *Oregon v. Kennedy,* 456 U.S. 667 (1982), was, in the words of Judge Gee, "clear and undisputed":

> When a mistrial is granted on a motion by the defendant, the double jeopardy clause ordinarily will not bar his reprosecution. *Lee v. United States,* 432 U.S. 23, 32-33, 97 S. Ct. 2141, 53 L.Ed.2d 80 (1977); *United States v. Dinitz,* 424 U.S. 600, 607-08, 96 S. Ct. 1075, 47 L.Ed.2d 267 (1976). If, however, the error underlying the motion was "motivated by bad faith or undertaken to harrass or prejudice the [defendant]," *Id.* at 611, 96 S. Ct. at 1081-82, the Government will not be permitted to subject the defendant to a retrial. *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976). "As interpreted by this circuit, the 'bad faith' standard applied to the Government . . . prohibits grossly negligent or intentional misconduct that seriously prejudices the defendant." *United States v. Davis,* 589 F.2d 904, 906 (5th Cir. 1979) (citing *United States v. Crouch,* 566 F.2d 1311, 1318 (5th Cir. 1978); *Kessler,* supra at 1256.

United States v. Garza, 603 F.2d 578, 580-581 (5th Cir. 1979). (prejudice was equated with whether a continua-

tion of trial would inevitably have resulted in a conviction).

What prejudice has Appellant suffered? Appellant spent time and money preparing for trial only to find that his defensive theory was totally undercut by the Government's misconduct. In contrast, the government was unprepared for trial. Al Ratliff, an assistant U.S. attorney ("AUSA"), was assigned the case only ten days before trial, and began interviewing witnesses less than one week prior to trial. Dr. Nottingham, the government psychiatrist, has seen Appellant on only one occasion. Dr. Altschuler, the defense psychiatrist, had seen Appellant seventeen times. It is not unreasonable to assume that the government needed additional time to prepare.

Has the government gained any advantage by reason of the mistrial? The government now knows the defense case, has more time to prepare psychiatric testimony, more time to interview fact witnesses, and more time to locate lay witnesses to combat Appellant's defenses of insanity and lack of specific intent.

Has the government's conduct sufficiently interfered with the integrity of the judicial process to justify dismissal? It wasn't a simple matter of failure to turn over documents. Appellant was given copies of discovery material without being told of or shown altered originals. The copies received were misleading. It was impossible to tell that the originals had been visibly altered. Appellant was also given copies that had been altered without being told of or being shown unaltered originals. Again, without being able to compare, it was impossible to know that BARCELONA only altered copies of some original statements.

The facts in *Oregon v. Kennedy,* were too weak for such an overreaching legal result. This Court should reconsider its decision in *Oregon v. Kennedy,* and again recognize a more general standard to encompass prejudice, prosecutorial overreaching and harassment.

X.

CONCLUSION AND PRAYER

Petitioner prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Fifth Circuit and that said judgment be reversed and the cause remanded with instructions to consider the double jeopardy issue based upon *United States v. Dinitz,* 424 U.S. 600 (1976) and *United States v. Garza,* 603 F.2d 578 (5th Cir. 1979).

Respectfully submitted,

BERG & ANDROPHY
DAVID H. BERG
JOEL M. ANDROPHY
3702 Travis Street
Houston, Texas 77002
(713) 529-5622

Attorneys for Petitioner

XI.

CERTIFICATE OF SERVICE

I, the undersigned authority, hereby certify that on the _____ day of May, 1987, three (3) copies of the Petitioner's Petition for Writ of Certiorari were mailed, postage prepaid to the Assistant U.S. Attorney Gough at the Federal Bldg., 515 Rusk Street, Houston, Texas 77002 as well as the Solicitor General, Department of Justice, Washington, D.C. 20530. All parties required to be served have been served. I am a member of the bar of this Court.

JOEL M. ANDROPHY

APPENDIX

INDEX TO APPENDIX

		Page
A.	United States Court of Appeals for the Fifth Circuit Opinion	1a
B.	1. United States District Court for the Southern District of Texas Order Number 1	8a
	2. United States District Court for the Southern District of Texas Order Number 2	9a
	3. United States District Court for the Southern District of Texas Order Number 3	10a
C.	United States Court of Appeals for the Fifth Circuit Judgment	11a
D.	Customer Original of New Account Deposit (Identified as Record Excerpt "14" in the original Court of Appeals Volume)	13a
E.	Bank Copy of New Account Receipt (Identified as Record Excerpt "13" in the Court original of Appeals Volume)	14a
F.	Photocopy of Customer Original of New Account Deposit (Identified as Record Excerpt "15" in the Court of Appeals Volume)	15a
G.	Excerpts of Petitioner's Brief in the United States Court of Appeals for the Fifth Circuit, pp. 14-16	16a
H.	1. United States Constitution — Fifth Amendment	19a
	2. United States Constitution — Sixth Amendment	20a
	3. United States Constitution — Fourteenth Amendment	21a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-2160

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TRACY S. BARCELONA,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(March 27, 1987)

Before THORNBERRY, GEE, and REAVLEY, Circuit Judges.

THORNBERRY, Circuit Judge:

Appellant Tracy S. Barcelona appeals the district court's denial of his motions to dismiss the indictment against him based on the separate grounds of double jeopardy and prosecutorial misconduct. We affirm the district court's denial of the double jeopardy motion but lack jurisdiction to review the district court's denial of the prosecutorial misconduct motion.

The United States charged Barcelona in an eight count indictment. Counts one through seven charged Barcelona with embezzlement and willful misapplication of bank funds. Count eight charged that Barcelona executed a scheme and artifice to defraud a federally insured financial institution.

On September 5, 1984, Barcelona used a $22,000 check to purchase two certificates of deposit at Guaranty Federal Savings & Loan for Pamela Mendiola. Allegedly without authorization, Barcelona took $2,000 for his personal use and turned over two $10,000 certificates of deposit to Mendiola. On October 26, 1984, Barcelona transferred money from Mendiola's savings account at one branch to a new account at a different branch. Allegedly without authorization, Barcelona took $7000 from the new account deposit for his own use.

Guaranty Federal recorded that transaction on a multi-part form. The bank retained a carbon copy of the form (the "bank copy"), and Barcelona received the original. The government alleges that after making the deposit Barcelona altered the original in two ways: by changing the "Less Cash" line from $7000 to $9000 and by adding the phrase "91 Day CD" to that line to indicate that he had used the $9000 to purchase another certificate of deposit. Barcelona then gave the altered customer original to Mendiola. The government argues that Barcelona altered the customer original to hide the $2000 that he took on September 5, 1984, and the $7000 that he took from the new account deposit. In any case, the customer original of the new account deposit reflects those changes, which are not found on the bank copy.

Barcelona's counsel planned a two-fold defense: (1) that Barcelona was legally insane at the time of the

offense; and (2) that he lacked the specific intent to commit the alleged crimes. He planned to argue that because Barcelona had done everything in the open, he wanted to be caught. Barcelona's counsel intended to argue from that premise that Barcelona must have been insane. During discovery, the government turned over a photocopy of the customer original of the new account deposit. The photocopy did not reflect that the alterations were made with a different pen. In other words, the photocopy did not reveal that Barcelona deceptively altered the customer original, which he gave Mendiola. Moreover, the government never gave Barcelona's counsel even a photocopy of the bank copy of the new account deposit. Comparison of the bank copy with the customer original also would have demonstrated the alteration and hence Barcelona's deception. Had the government provided either the customer original itself (as opposed to a photocopy) or even a photocopy of the bank copy, then Barcelona's counsel would have realized that his planned defense did not fit the facts.

At trial, defense counsel based its opening argument upon the defense that Barcelona's scheme was so transparent that Barcelona had to have been insane at the time. According to defense counsel, Barcelona never tried to hide the alleged thefts and that supported the argument that he was insane. During its case, the government introduced the customer original and also the bank copy of the new account deposit. Obviously altered, the customer original discredited any defense based on a lack of deception. In addition, the discrepancies between the bank copy and the altered customer original also demonstrated that Barcelona had altered the customer original after it was detached from the bank copy. Surprised by

the introduction of the evidence that he had never seen, Barcelona's counsel moved for a mistrial, which the court granted.

The government admits that it had a continuing duty of disclosure and should have called the alterations to defense counsel's attention before the trial began. The Assistant United States Attorney stated that the omission had been inadvertent and that he had either been unaware of or not appreciated the significance of the variance between the customer original and the bank copy. The trial court accepted that explanation but granted a mistrial because the surprise had already prejudiced Barcelona's defense at the first trial.

Three days later, Barcelona filed motions to bar any retrial on the grounds of double jeopardy and prosecutorial misconduct. After a hearing the trial court denied both motions to dismiss.

Double Jeopardy

A defendant may not ordinarily appeal the denial of his motion to dismiss because that denial is not a final decision. 28 U.S.C. § 1291; *see* United States v. McLean, 738 F.2d 655, 660 n.10 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1748 (1985). Courts of appeals do have jurisdiction, however, to review the denial of a motion to dismiss based on double jeopardy grounds. Abney v. United States, 97 S. Ct. 2034, 2040-41 (1977). "[S]uch orders fall within the 'small class of cases' that *Cohen* has placed beyond the confines of the final-judgment rule." *Id.* at 2040 (footnote omitted); *see* Cohen v. Beneficial Industrial Loan Corp., 69 S. Ct. 1221, 1225 (1949).

As a general rule the double jeopardy clause does not bar retrial after a court grants the defendant's request for a mistrial. In *Oregon v. Kennedy,* the Supreme Court clarified the exception to that general rule:

> Prosecutorial misconduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . . Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

102 S. Ct. 2083, 2089 (1982) (citations omitted). The test "calls for the court to make a finding of fact. Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system." *Id.* We must affirm the trial court's factual findings unless they are clearly erroneous. Robinson v. Wade, 686 F.2d 298, 309 (5th Cir. 1982).

Barcelona points to the following circumstantial evidence to prove that the prosecution intended to provoke a mistrial: "[Assistant U.S. Attorney] Ratliff had been assigned the case only ten days before trial. He began talking to witnesses less than one week prior to trial. Dr. Nottingham, the Government's psychiatrist, had only seen the Appellant on one occasion. Dr. Altschuler[, the defense psychiatrist,] had seen Appellant seventeen times." Barcelona argues both that the government's evidence completely destroyed his defense and that the government needed more time to prepare for trial. The

government readily admits that before trial it should have produced the documents that Barcelona's counsel eventually received; nevertheless, "simple negligence will not support invocation of the double jeopardy clause." *Robinson,* 686 F.2d at 309. The trial court's findings are not clearly erroneous.

Prosecutorial Misconduct

Barcelona also argues that the government's misconduct justifies dismissing the indictment on due process grounds. We do not reach the merits of this claim because the trial court's denial of Barcelona's motion to dismiss on the grounds of prosecutorial misconduct is not a final decision. *See* United States v. Wright, 622 F.2d 792, 793-94 (5th Cir.), *cert. denied,* 101 S. Ct. 376 (1980).

The facts in *Wright* closely parallel the facts here. In *Wright,* the first trial resulted in a hung jury, and Wright requested a mistrial. Before the second trial began Wright moved to dismiss the indictment on the grounds of both double jeopardy and prosecutorial misconduct. Wright argued that prosecutorial misconduct, including nondisclosure of certain pieces of evidence, justified dismissing the indictment both because that conduct provoked him to request a mistrial (and hence double jeopardy barred a retrial) and because it denied him a fair trial. In *Wright,* we stated that, "Wright's motion to dismiss the indictment and the issue of prosecutorial overreaching, *inasmuch as it relates to the double jeopardy question,* are reviewable by this Court." *Id.* at 793 (emphasis added) (footnote omitted). we also held that "the District Court's failure to dismiss the indictment *as a direct result* of prosecutorial overreaching, separate and apart

from the double jeopardy claim," is not appealable because, "[n]one of Wright's specific claims of governmental misconduct fall within the *Cohen* 'collateral' order exception. . . ." *Id.* at 794 (emphasis in original). *Wright* controls this appeal.

We affirm the district court's denial of Barcelona's double jeopardy motion. Lacking jurisdiction, we do not reach Barcelona's prosecutorial misconduct argument and therefore dismiss that part of his appeal.

AFFIRMED IN PART AND
DISMISSED IN PART.

APPENDIX B1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CR. G-85-9

UNITED STATES OF AMERICA

v.

TRACY S. BARCELONA

(Filed March 11, 1986)

ORDER

Having successfully moved for a mistrial, defendant now moves to dismiss the indictment, claiming that the government's failure to produce documents constitutes prosecutorial misconduct and that another trial would amount to double jeopardy. The Court heard defendant's motion on March 6, 1986 and found that the defendant has not established the government's intent in causing a mistrial. Nor has the defendant proved that the government's conduct was designed to goad the defendant into moving for a mistrial. *See United States v. Mitchell,* 736 F.2d 1299 (9th Cir. 1984); *United States v. Dante,* 739 F.2d 547 (11th Cir. 1984); *Oregon v. Kennedy,* 456 U.S. 667 (1982).

Accordingly, it is ORDERED, ADJUDGED and DECREED that defendant's motion to dismiss be, and is hereby, DENIED.

DONE at Galveston, Texas, this the eleventh day of March, 1986.

/s/ HUGH GIBSON
United States District Judge

APPENDIX B2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CR. NO. G-85-9

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRACY S. BARCELONA,
Defendant.

(Filed March 11, 1986)

ORDER

UPON PRESENTATION of Defendant's Motion for Written Findings Regarding Motion to Dismiss, the same is GRANTED, and the Court finds that Defendant's motion to dismiss the indictment presents a colorable claim pursuant to the Double Jeopardy Clause, and thus is not frivolous.

IT IS SO ORDERED at Galveston, Texas, on the 11th day of March, 1986.

/s/ HUGH GIBSON
Hugh Gibson
United States District Judge

APPENDIX B3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CR. NO. G-85-9

UNITED STATES OF AMERICA,
Plaintiff,

v.

TRACY S. BARCELONA,
Defendant.

(Filed March 11, 1986)

ORDER GRANTING MOTION TO STAY TRIAL PROCEEDINGS PENDING INTERLOCUTORY APPEAL

BE IT REMEMBERED that on this day there came on to be heard Defendant's Motion to Stay Trial Proceedings Pending Interlocutory Appeal in the aforereferenced cause of action. The Court, after considering same, is of the opinion that said Motion should be granted in all respects. It is therefore—

ORDERED, ADJUDGED and DECREED that Defendant's Motion to Stay Trial Proceedings Pending Interlocutory Appeal is hereby GRANTED. This ruling renders MOOT defendant's motions for a continuance and for a competency hearing.

SIGNED on this the 11th day of March, 1986.

/s/ HUGH GIBSON
Hugh Gibson
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2160

D. C. Docket No. CR-G-85-9

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TRACY S. BARCELONA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

(Filed March 27, 1987)

Before THORNBERRY, GEE, and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed

as to its denial of appellant's double jeopardy motion, and is dismissed as to his prosecutorial misconduct argument for want of jurisdiction.

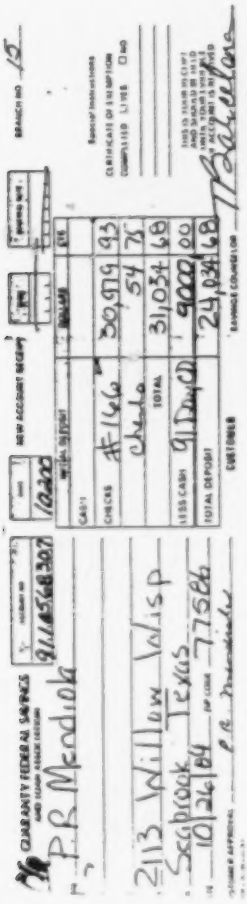
March 27, 1987

ISSUED AS MANDATE: APRIL 20, 1987

APPENDIX D

* THIS IS A COPY. PLEASE SEE ORIGINAL EXHIBIT IN ORIGINAL VOLUME OF RECORD EXCERPTS.

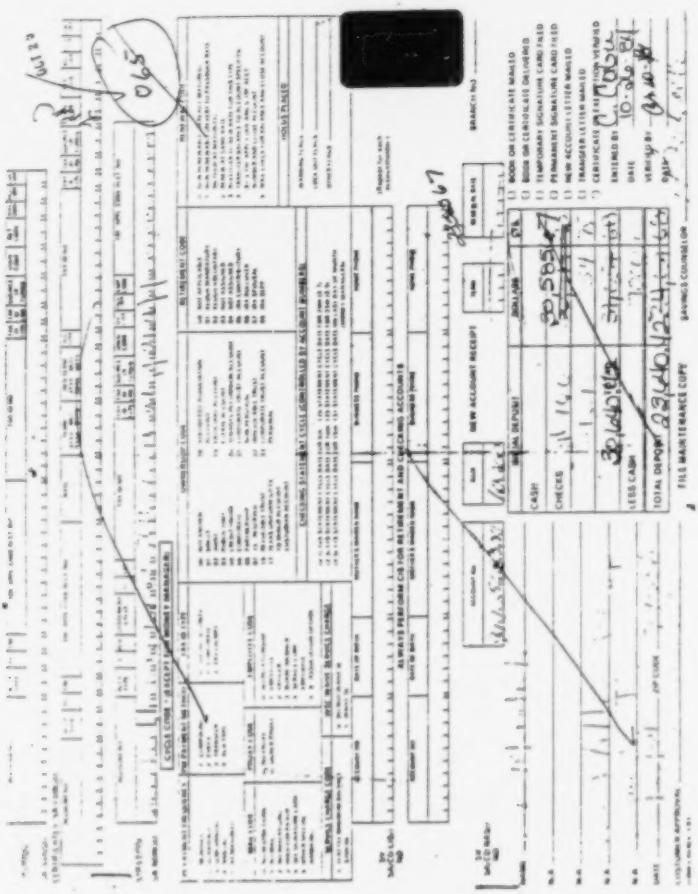
The original is on file with the Fifth Circuit Court and marked as Record Excerpt 14. Counsel has requested that Petitioner's original brief and the original Record Excerpts be certified by the Court of Appeals for the Fifth Circuit and transmitted to this Court for filing.



APPENDIX E

* THIS IS A COPY. PLEASE SEE ORIGINAL EXHIBIT IN ORIGINAL VOLUME OF RECORD EXCERPTS.

The original is on file with the Fifth Circuit Court and marked Record Excerpt 13. Counsel has requested that Petitioner's original brief and the original Record Excerpts be certified by the Court of Appeals for the Fifth Circuit and transmitted to this Court for filing.



GUARANTY FEDERAL SAVINGS
AND LOAN ASSOCIATION

ACCOUNT NO 9111056830?

DATE 10/26/04 NEW ACCOUNT RECEIPT TERM RENEWAL DATE BRANCH NO. 15

P.R Mendiola

113 Willow Wisp
Seabrook, Texas
ZIP CODE 77586

INITIAL DEPOSIT	DOLLARS	CTS.
CASH		
CHECKS #166	30,979	93
Checks	54	75
TOTAL	31,034	68
LESS CASH 91 Day CD	9000	00
TOTAL DEPOSIT	24,034	68

Special Instructions
CERTIFICATE OF EXEMPTION
COMPLETED ☐ YES ☐ NO

THIS IS YOUR RECEIPT AND SHOULD BE HELD UNTIL YOUR EVIDENCE OF ACCOUNT IS RECEIVED

MANAGER APPROVAL P.R. Mendiola

CUSTOMER

SAVINGS COUNSELOR

Depositor's Copy

GUARANTY FEDERAL SAVINGS
AND LOAN ASSOCIATION

:113113718261: 0091105568307#

DEFENDANT'S EXHIBIT 2 (V)

APPENDIX G

EXERPTS OF PETITIONER'S BRIEF

On March 5, 1986, after the mistrial, and prior to the rescheduled trial date of March 10, 1986, the Government opened their file for Appellant's perusal. The following comparison of the documents disclosed on March 5, 1986, versus the documents disclosed prior to trial will refer to the March 7, 1986, post-trial hearing exhibits offered on the issues of double jeopardy and prosecutorial misconduct.

On January 14, 1986, Appellant was provided with Appellant post-trial hearing exhibit ("A.H.E.") 2 (R.E. 19), a photocopy of Moran's account signature card. On March 5, 1986, Appellant was apprised of A.H.E. 10 (R.E.27). A.H.E. 10 (R.E.27) is the original of A.H.E. 2 (R.E.19). The copy which is radically different from the original, does not indicate the white-out of BARCELONA's name, nor the tape or torn portions (T., Vol. 2, p. 140). On March 5, 1986, Appellant was provided with A.H.E. 4 and 11 (R.E.20 and 28), bank statements of Moran. They indicate an altered balance of $26,444.44 on an account with only Moran's name and address. A close reading of the number 6 in $26,444.44 in A.H.E. 11 (R.E.28) reflects an alteration in pen. A.H.E. 3 (R.E. 20) is a copy of a crumbled and altered A.H.E. 11 (R.E. 28). Only A.H.E. 12 (R.E.29) was provided to Appellant on January 14, 1986. It is an unaltered original of A.H.E. 3 & 11 (R.E.20 and 28). It reflects an unaltered balance of $20,444.44 on an account listing both Moran's & BARCELONA's names and BARCELONA's address. (T. Vol. 2, pp. 142-143, 146, 168, 175, 176, 182-186).

On March 5, 1986, Appellant received A.H.E. 4 (R.E. 21), a statement by BARCELONA authorizing and consenting for access to financial information (T. Vol. 2, pp. 144-145). Appellant was also not apprised of A.H.E. 5 and 6 (R.E.22 and 23) until March 5, 1986. (T. Vol. 2, pp. 144-145). These documents were apparently seized from BARCELONA's desk drawer at Guaranty Federal. On January 9, 1986, the Government stated there was no grounds for suppression. (D.R.22). The Government's conclusory statement that there was not a search incident to an arrest by law enforcement was self-serving. Even the District Court questioned the Government's analysis. (T. Vol. 2, p. 154). A.H.E. 7 (R.E.24) also was not provided until March 5, 1986. It seems to relate to a verbal request by BARCELONA regarding backdating and closing an account with a missing signature card. (T. Vol. 2, p. 180). A.H.E. 8 and 9 (R.E. 25 and 26) were also not provided until March 5, 1986. They are daily audits of City Savings accounts. They show the identical money going in and out of the accounts of Moran and Barcelona. (T. Vol. 2, pp. 145-146). Those documents are clearly exculpatory and consistent with Appellant's defense that everything was done in the open, that there had been no deception, and that he wanted to be caught. A.H.E. 13 (R.E.30) was the letter written by Shaw on January 14, 1986, and turned over to counsel along with the discovery. (T. Vol. 2, p. 185). Appellant was also not provided with A.H.E. 14, 15, and 15a (R.E.31, 32 and 33) until March 5, 1986. In those documents Moran indicates to someone at the bank that the withdrawals were made without "proper" authorization (T. Vol. 2, p. 190). These documents are arguably exculpatory. Moran may have consented to with-

drawals under certain circumstances. (T. Vol. 2, p. 190). A.H.E. 16 (R.E.34) is more handwritten notes and A.H.E. 17 (R.E.35) is another signature card apparently torn up by BARCELONA. (T. Vol. 2, p. 193). Both were received from the Government on March 5, 1986.

After a review of the government's file, defense counsel requested a hearing to raise the issues of double jeopardy and prosecutorial misconduct. The court scheduled a hearing on March 7, 1985, and prior to the rescheduled trial date of March 10, 1985, to decide whether the indictment should be dismissed based upon double jeopardy and/or prosecutorial misconduct. At a hearing on March 7, 1985, the Court was apprised of the March 5, 1986 discovery session, and the additional neglect on the part of the government with regard to pretrial discovery.

The United States Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667, 675-676 (1982), held that a defendant is entitled to dismissal on double jeopardy grounds if the court finds the prosecutor intentionally provoked the defendant into moving for a mistrial so the Government would have the opportunity to try the case before another jury. Conduct that would be sufficient to justify a mistrial would not bar retrial unless the court finds such intent on the part of the prosecutor. *Id.* at 675-676; *United States v. Dante*, 739 F.2d 547, 549 (11th Cir. 1984). Examples of prosecutorial overreaching were defined in instances . . .

APPENDIX H1

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeojardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H2

Amendment 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX H3

Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.